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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. ~~1403~~ 521

ERNEST FOGARASCHER and
TABITA FOGARASCHER CIOCAN,
Petitioners,

vs.

ROBERT FRICKE,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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QUESTION PRESENTED.

Whether upon exceptions filed to an Inventory and Appraisal, the Probate Court in Ohio can determine that a woman was the surviving spouse and therefore entitled to a year's allowance and exempted estate?

REASONS FOR DENYING THE WRIT.

I. Under Sections 2115.02 and 2115.05 of the Ohio Revised Code, every executor or administrator must make and file an inventory and appraisal of his decedent's estate within one month of his appointment.

II. Under Section 2115.13 of the Ohio Revised Code, the appraisers must provide an exempted estate for the surviving spouse. The exempted estate is a preferred claim against the estate, *Raleigh v. Raleigh*, 153 Ohio St. 160, 91 N. E. 2d 241 (1950), and is so reflected on the inventory and appraisal.

III. Under Section 2117.20 of the Ohio Revised Code, the appraisers must set off to the widow a year's allowance. The year's allowance is a debt against the estate, *Raleigh v. Raleigh, supra* and is so reflected on the inventory and appraisal.

IV. Under Section 2115.16 of the Ohio Revised Code, "exceptions to the inventory or to the year's allowance may be filed at any time prior to five days before the date set for the hearing" on the Inventory. Notice of the exceptions under Section 2115.16 "shall forthwith be given to the executor or administrator and his attorney by registered mail or personal service. * * *"

V. In the instant case Respondent was allowed neither an exempted estate, nor a year's allowance as provided by law. Pursuant to Ohio Revised Code 2115.16, Respondent filed exceptions to the Inventory and Appraisal, and gave notice according to that section. The Probate Court found Respondent to be the surviving spouse and thus entitled to a year's allowance and exempted estate. Such determination was made in accordance with the Ohio Statute and case law. See, *In re: Clark,* 69 Ohio Abs. 435, 128 N. E. 2d 437 M. C. O., October 6, 1954; *In re: Scott,* 8 O. N. P. (NS) 279, 19 O. D. N. P. 577 (1909).

VI. In view of the above, it is apparent that petitioner's contention is without foundation.

The reason that Ohio Revised Code 2115.16 provides that notice of proceedings thereunder is given only to the fiduciary and his attorney is clear. The fiduciary has the duty of preparing and filing the inventory and appraisal pursuant to Ohio Revised Code 2115.02 and 2115.05. Accordingly, the Ohio Legislature has placed the duty of defending the contents and accuracy of the inventory upon the fiduciary.

Notice to others would thus be inconsistent with the subject matter and purpose of the statute.

VII. The merit of petitioners' contentions has already been decided adversely to them by this Court in the case of *McCaughey v. Lyall*, 224 U. S. 558 (1912). In that case, the plaintiffs in error were heirs at law of a deceased mortgagor. Under California law, title to the mortgaged realty vested in the heirs upon the death of their ancestor, subject to being divested in the course of administration. However, the California Civil Code, Section 1582, provided that an action to foreclose the mortgage could be maintained solely against the decedent's executor. Pursuant to this statute and under court decisions construing it, the complainant heirs were not made parties to the foreclosure proceedings. They claimed that the statute as construed deprived them of property without due process of law.

The court held unequivocably that the State of California had the right to define the necessary parties to a proceeding involving the devolution of the estate of a California decedent.

In view of the decision in the *McCaughey* case, it is evident that this Court should not question the right of the State of Ohio to define the parties who are necessary to the determination of questions regarding the substance of the inventory and appraisal which the decedent's fiduciary is required by law to prepare, to file and to defend. To hold otherwise would deny to the State of Ohio the power to legislate with reference to the subject matter of Ohio fiduciaries and their duties, a result clearly not contemplated by either the State or Federal Constitutions.

VIII. Petitioners, in relying on the cases of *Mullane v. Central Hanover Bank and Trust*, 339 U. S. 306 (1950)

and *Schroeder v. City of New York*, 371 U. S. 208 (1962), have begged the question by assuming the major premise of their argument—that they were entitled to notice. In *Mullane* and *Schroeder*, the complainants were afforded notice by the statutes in question. The issue in those cases was the sufficiency of the quality of the notice.

CONCLUSION.

The Supreme Court of Ohio denied the Petitioner's motion to certify and their appeal as a matter of right because it felt that no Constitutional question was involved. Clearly, Respondents maintain that the State of Ohio has the right to control the devolution of property within its borders. The statute in question which defines that the fiduciary is the only necessary party to an action challenging the inventory and appraisal of a decedent's estate is clearly proper and Constitutional, being a reasonable exercise of the power of the State of Ohio to legislate with reference to Ohio fiduciaries and their duties in respect to the administration of their decedent's estate. *McCaughey v. Lyall*, 224 U. S. 558 (1912).

Respectfully submitted,

ELLIS V. RIPPNER and
RICHARD W. SCHWARTZ,
Counsel for Respondent.

APPENDIX.

STATUTES.

Ohio Revised Code, Section 2115.02. Inventory; separate schedule:

"Within one month after the date of his appointment, unless the Probate Court grants an extension of time for good cause shown, every executor or administrator shall make and return on oath into court a true inventory of the real estate of the deceased located in Ohio and the chattels, moneys, rights, and credits of the deceased which are to be administered and which have come to his possession or knowledge. * * *."

Ohio Revised Code, Section 2115.05. Who shall make inventory:

"After giving the notice required in Section 2115.04 of the Revised Code, the executor or administrator, with the aid of the appraisers, if an appraisement is made, shall make the inventory required by Section 2115.02 of the Revised Code."

Ohio Revised Code, Section 2115.13. Property exempt from administration:

"When a person dies leaving a surviving spouse or minor children, certain properties, if selected as provided in this section, are not assets or administered as such, but must be included and stated in the inventory of the estate. * * *"

Ohio Revised Code, Section 2117.20. Year's allowance to widow and children:

"The appraisers of a decedent's estate shall set off and allow to the widow and to the children under the age of eighteen years, or if there is no widow then to such

children, sufficient provisions or other property to support them for twelve months from the decedent's death, * * *"